IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 62449-1-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	UNPUBLISHED OPINION
JOSHUA D. MASON,	)	
	)	
Appellant.	)	
	)	FILED: March 29, 2010

Leach, J. — Joshua Mason challenges his convictions of second degree assault and tampering with a witness. He argues that the assault conviction violates double jeopardy because the State's proof for that count was the same as for two counts of rape, for which he was also convicted. But he has not established that the State's proof was the same. He further argues that the evidence was insufficient to support the means of witness tampering alleged by the State. But sufficient evidence supported the conviction of witness tampering. We affirm both convictions.

Background

Joshua Mason and Briana Brown began dating in 2006 and moved in together in early 2007. The couple separated after a few months, however,

when Mason began spending a significant amount of time with another woman, who claimed he was the father of her child.

Late the night of April 11, 2007, Mason began sending Brown text and phone messages that he needed to see her. When Brown called him, Mason sounded very upset. He said the other woman had lied about him being the child's father, and he could not handle the news. Brown agreed to meet him. Still appearing sad and upset, Mason drove her to the apartment they had shared. They arrived at approximately 2:30 a.m.

Once inside the apartment, Mason's demeanor changed. He angrily accused Brown of cheating on him. When she tried to leave, he held a steak knife to her throat. Mason told Brown she had hurt him and was going to have to pay. When she tried to leave a second time, he threw her down and choked her with his hands for 20 to 25 seconds. He then ordered her to disrobe and, still armed with the knife, demanded oral sex. Believing his threats, Brown complied. At some point he put a sock in her mouth and bound her head with a cord.

Mason then made her lie on the floor on her back so he could have sex with her, threatening to kill her if she moved, screamed, or yelled in any way. He specifically threatened to stick the knife into her vagina and held the knife in her vaginal area to show that he was serious. Mason inserted his penis inside of Brown's vagina and had intercourse with her, all the while holding the knife to her throat.

After this rape, Mason displayed some remorse but eventually became angry again, claiming Brown was lying when she said she still loved him. When she pleaded with him not to hurt her, Mason chased Brown around a table, threw her to the ground, choked her for about 30 seconds, and then punched her in the face. Waving the knife around, he cut her hands.

A while later, Mason pulled out a bed in the living room and ordered her to lie down to sleep with him. He tied their wrists together so she could not escape. At 7 a.m., Mason got up and took Brown to the kitchen where he ordered her to open a cabinet and take out a bottle of Pine Sol cleaner. Still armed with the steak knife, he picked up a larger kitchen knife and told Brown she had to drink the Pine Sol or he would kill her with the knife. Though the cleaning fluid burned her mouth and throat, she complied by drinking a little. He told her it was not enough and she was choosing to die. She then drank more, which caused her to vomit repeatedly, have trouble breathing, and intermittently lose consciousness. When lucid, she asked him to take her to the hospital. Mason refused, saying he wanted to watch her die.

Eventually, Mason raped Brown vaginally at knifepoint again. Afterwards, he ran the knife up and down on her back, causing multiple small lacerations. On his orders, she wrote a suicide note. Mason then agreed to take her to the hospital after she promised to say she had hit herself with a stereo speaker and attempted suicide by drinking the Pine Sol.

Brown followed Mason's instructions at the hospital, but medical staff did not believe her explanations for her injuries. Eventually she told authorities what Mason had done, and a police investigation followed. Officers recovered the knife, the gag, the cord, the partial bottle of Pine Sol, and other items Mason had used. Photographs of the locations where Brown vomited were taken. A rape examination and DNA (deoxyribonucleic acid) test showed that Mason had had sexual intercourse with Brown and that she had sustained vaginal injuries consistent with blunt force trauma.

Mason was eventually charged and arrested. While incarcerated, he called Brown on a jail telephone. In the call, which was recorded, he told Brown that she needed to call the case detective and tell him nothing had happened. He also discussed with Brown her fear that he or his family would injure her and suggested he could help her pay off back rent if she made the calls.

Mason was charged with two counts of first degree rape, one count of second degree assault, and one count each of felony harassment, unlawful imprisonment, and tampering with a witness. The two first degree rape counts required the jury to find Mason engaged in sexual intercourse with Brown by forcible compulsion and used or threatened to use a deadly weapon or what appeared to be a deadly weapon. At trial, Mason testified that he had consensual sexual intercourse with Brown and that she manufactured all other evidence of rape and assault. He acknowledged making the phone call from jail.

Mason was convicted of all charges.

At sentencing, based on the State's concession regarding same criminal conduct, the court did not enter convictions on the harassment and unlawful imprisonment counts. For the remaining offenses, Mason received a standard range sentence that included consecutive terms of incarceration of 120 months and 93 months, respectively, for the rape counts as serious violent offenses and consecutive deadly weapon enhancements for the rape and assault counts.

Mason appeals.

Discussion

Mason first argues that his conviction of assault violates double jeopardy and must be vacated because it "is well established to be 'the same offense' as rape." While the State may bring multiple charges arising from the same criminal conduct in a single proceeding, the state and federal constitution prohibit multiple punishments for the same offense.[1] We review an alleged violation of double jeopardy de novo within the context of the jury instructions as a whole.[2]

Our Supreme Court "has repeatedly rejected the notion that offenses committed during a 'single transaction' are necessarily the 'same offense'."[3]

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[1] State v. Vladovic, 99 Wn.2d 413, 422, 662 P.2d 853 (1983).

[2] State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005); State v. Berg, 147 Wn. App. 923, 931, 198 P.3d 529 (2008).

[3] Vladovic, 99 Wn.2d at 423.

Here, it is undisputed that Mason's conduct supports the charge of second degree assault as well as the two counts of first degree rape. Therefore, the question is whether, in light of legislative intent, the charged crimes constitute the same offense.[4]

Our Supreme Court has set forth a multipart test for determining whether multiple punishments are allowed for the same criminal conduct. First, we consider whether there is express or implied legislative intent based on the criminal statutes involved.[5] When, as here, there is no such indicator, the court asks whether the two crimes are the same in both fact and law.[6] Offenses are the same in fact when they arise from the same act or transaction and are the same in law when proof of one would also prove the other.[7] The merger doctrine may also help determine legislative intent if the degree of one offense is elevated by conduct constituting a separate offense.[8] Finally, a "well established exception" may allow two convictions to stand even when they otherwise appear to be the same offense according to the foregoing rules if there is an independent purpose or effect to each crime that is not merely incidental to the other crime.[9]

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[4] In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004).

[5] State v. Martin, 149 Wn. App. 689, 698, 205 P.3d 931 (2009).

[6] Martin, 149 Wn. App. at 698-99.

[7] Martin, 149 Wn. App. at 699.

[8] State v. Kier, 164 Wn.2d 798, 803-04, 194 P.3d 212 (2008).

[9] Freeman, 153 Wn. 2d at 778-79 (quoting State v. Frohs, 83 Wn. App. 803, 807, 924 P.2d 384 (1996)).

Mason's briefing does not discuss, let alone make any attempt to apply, this multipart test. He merely asserts that the offenses are the same because, under what he terms "similar circumstances," our courts have found that second degree assault is the same offense as first degree robbery. For this proposition, he cites State v. Bresolin.[10] In Bresolin, this court found assault and robbery to be the same offense where the victim was threatened and repeatedly kicked during the course of an armed robbery. The particular acts of force necessary to commit the robbery were the same as the particular acts of force that constituted assault:

> The litany of injuries inflicted upon the victim was part of a continuing, uninterrupted attack to secure "dope" or money, and constituted proof of an element included within the crime of robbery. Under the evidence in this case, the assaults inflicted were not separate and distinct from the force required for the robbery. State v. Smith, 9 Wn. App. 279, 511 P. 2d 1032 (1973). The Smith case points up the converse of the situation where the acts of force which constituted an element of the robbery there committed were different acts of force than those which constituted the assault. The evidence in this case indicates that there was no cessation of the infliction of fear and injury upon the victim and a later resumption of a separate and distinct act of violence. The purpose of the acts of the defendant was the single purpose of effectuating the robbery of the victim. . . . Under the pleadings and the proof presented, the conviction of assault in the second degree based upon the force used to accomplish the robbery of Mark Medearis must be set aside.[11]

As this quotation from Bresolin indicates, this court in Smith reached the opposite conclusion with respect to a robbery with different facts. There, the two

[10] 13 Wn. App 386, 534 P.2d 1394 (1975).
[11] Bresolin, 13 Wn. App. at 394.

defendants robbed a credit union while armed with revolvers. Before leaving, they herded eight credit union employees into a back room. The court agreed with the State's contention that the assault occurred after completion of the robbery and, thus, a separate crime was committed. "The acts of force necessary to commit the robbery were different from the acts of force exerted against the employees who were herded into the back room. The latter act of force was exerted to ensure defendant's escape—not to obtain credit union property."[12] In this case, the circumstances more closely resemble those in Smith than in Bresolin. Mason's acts of assault went far beyond what was necessary to commit rape. The purpose of forcing Brown to drink Pine Sol, for example, was to punish her for suspected infidelity by causing physical and emotional harm—as evidenced by Brown's statements about wanting to watch her die. In addition, we have previously stated that the same evidence test was not properly applied in Bresolin.[13]

The State acknowledges that our Supreme Court has held that, under certain circumstances, convictions for assault as well as first degree rape can violate principles of double jeopardy: "As we read the statutes, the legislature intended that conduct involved in the perpetration of a rape, and not having an independent purpose or effect, should be punished as an incident of the crime of rape and not additionally as a separate crime." [14] Johnson was convicted of

[12] Smith, 9 Wn. App at 282-83.
[13] State v. Tanberg, 121 Wn. App. 134, 140, 87 P.3d 788 (2004).

rape, kidnapping, and assault, all in the first degree, for picking up two teenage hitchhikers, providing them with intoxicants, locking them in his home, and raping them while carrying a knife and making threats. The court noted that in any given case charging first degree rape, the State must prove that the rape was accompanied by an act such as assault or kidnapping that is defined as a crime by a separate statute.

> We hold that, as to any such offense which is proven, an additional conviction cannot be allowed to stand unless it involves some injury to the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element."[15]

The court ordered that the kidnapping and assault convictions be stricken because, in that case, the proof of restraints and use of force "were intertwined with the rape. They occurred almost contemporaneously in time and place. The sole purpose of the kidnapping and assault was to compel the victims' submission to acts of sexual intercourse. These crimes resulted in no injury independent of or greater than the injury of rape."[16]

Thus, the State contends that Johnson recognized an exception to the application of the double jeopardy-merger doctrine where conduct involved with the rape has an independent purpose or effect. Since Mason's acts of assault had this independent purpose or effect, the exception applies.

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[14] State v. Johnson, 92 Wn.2d 671, 676, 600 P. 2d 1249 (1979).
[15] Johnson, 92 Wn.2d at 680.
[16] Johnson, 92 Wn.2d at 681.

Mason argues in his reply brief that Johnson actually supports his double jeopardy argument because, like in this case, "Johnson involved an assault over time and multiple instances of assaultive conduct with a knife." But application of Johnson's holding to the facts of this case leads to the same result as our discussion of Smith. The evidence reflects three acts of forcible rape over a period of seven hours. While each of the acts of force necessary to elevate the rapes to first degree could also support the conviction for second degree assault, the evidence also reflects that the acts of force—strangulation, torture, beating, punching, poisoning, and cutting—were not limited to the purpose of compelling Brown to submit to sexual intercourse. And the injuries Brown incurred by drinking Pine Sol and being cut with a knife were independent of and much greater than the injury of rape. Under Johnson, assault in this case is not the "same offense" as rape.

In his reply brief, Mason advances a new double jeopardy argument. Because the jury was not asked to specify which alternative means of assault they relied on for the assault conviction, he claims that they may have relied upon the same evidence they used for a rape conviction. The assault count was charged under five statutory alternative means: assault with a deadly weapon, assault by torture, assault by strangulation, assault by poison, and assault with the intent to commit first degree rape or unlawful imprisonment. The jury rendered a general assault verdict. Mason argues that the verdict is ambiguous

and that, under the rule of lenity, we must assume that the jury convicted him of assault with the intent to commit rape. According to Mason, this means that the assault offense was the same as the rape offense, and therefore the assault conviction must be stricken.

We will not consider an issue raised for the first time in a reply brief.[17] We have relaxed this rule in cases where the issue was created by events occurring after the opening brief was filed.[18] But we cannot perceive, and Mason has not suggested, any reason why he could not have made his argument about alternative means in his opening brief. Our reluctance to consider an issue to which the State has not had an opportunity to respond is compounded by the conclusory nature of Mason's argument (one page). This is the type of issue that requires a "hard look."[19] Mason's briefing is inadequate to support a "hard look." He has not explained how his argument can be reconciled with the holding of Johnson. The only precedent he cites for the proposition that more than a general verdict of assault was necessary is State v. DeRyke.[20] It is not obvious that the rationale of DeRyke carries over to a case involving alternative means rather than multiple acts.

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[17] State v. White, 123 Wn. App. 106, 114 n.1, 97 P.3d 34 (2004).

[18] State v. McNeal, 142 Wn. App. 777, 789 n.19, 175 P.3d 1139 (2008).

[19] Freeman, 153 Wn.2d at 774; see also Kier, 164 Wn.2d at 808.

[20] 110 Wn. App. 815, 824, 41 P.3d 1225 (2002), aff'd on other grounds, 149 Wn.2d 906, 73 P.3d 1000 (2003) (vacation of kidnapping conviction required when jury's verdict unclear as to whether it relied on kidnapping or deadly weapon to elevate attempted rape offense to first degree).

For the proposition that a conviction for assault with attempt to rape is the "same offense" as first degree rape, Mason also cites State v. Martin[21] and claims that his appeal is "significantly similar." In Martin, the question was whether a conviction for second degree assault and attempted third degree rape were the "same offense."[22] We recognized that when one crime is an anticipatory offense, an abstract comparison of elements by application of the Blockburger[23] test will not suffice.[24] In that respect we followed the analysis in In re Personal Restraint of Orange.[25] In Martin, the defendant's offenses were the same because both the assault and attempted rape "were predicated on the same conduct: [his] assault with intent to rape."[26] The defendant broke into a room where the victim was using the phone, pinned her arms above her head and started to pull down her pants before someone pulled him away.[27] "The assault was the substantial step towards the rape; there was no independent purpose. The evidence required to support Martin's conviction for attempted third degree rape was the same evidence used to convict him of second degree

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[21] 149 Wn. App. 689, 205 P.3d 931 (2009).

[22] Martin, 149 Wn. App. at 698.

[23] Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

[24] Martin, 149 Wn. App. at 699.

[25] 152 Wn.2d 795, 820, 100 P.3d 291 (2004) (attempted murder is the same offense in fact and law as first degree assault when the assault is committed with a firearm and the shooting with the firearm is the substantial step toward murder).

[26] Martin, 149 Wn. App. at 700.

[27] Martin, 149 Wn. App. at 692.

assault. Under the Blockburger test, the two crimes were the same offense."[28] Mason's cursory briefing (which does not mention the Blockburger test at all) does not persuade us that the same can be said in this case, which unlike Martin and Orange did not involve a single act of assault. Here, the evidence included numerous brutal acts of assault. It cannot be said that all of them, even if they were all committed with intent to rape, were necessarily the "same offense" as the acts of forcible rape. Thus, his appeal is not significantly similar to the Martin case.

We conclude that Mason has failed to establish double jeopardy.

Mason next challenges the sufficiency of the evidence to convict him of witness tampering. The State must prove each element of the charged crime beyond a reasonable doubt.[29] Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could find the essential elements of the crime proved beyond a reasonable doubt.[30]

To prove witness tampering, the State had to show (1) that Mason attempted to induce Brown to withhold "from a law enforcement agency information which he or she has relevant to a criminal investigation" and (2) that

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[28] Martin, 149 Wn. App. at 700-01.

[29] Jackson v. Virginia, 443 U.S. 307, 316-20, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

[30] State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

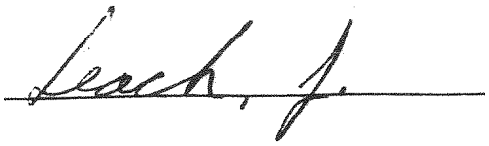
Brown was "a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation."[31]

Mason challenges the sufficiency of evidence for the first element. He contends the State could not prove that he attempted to convince Brown to withhold information from the police because, by the time he called her from jail, she had already given them all relevant information. However, the evidence showed that Mason asked Brown to recant her description of the incident for which he had been arrested months before his case was scheduled for trial. It is reasonable to infer he did so contemplating that she would be asked by police and prosecutors to recount her version of the story in, for instance, pretrial interviews. Thus, he was attempting to persuade her to withhold from law enforcement agencies information she had relevant to the rape investigation.

The evidence is sufficient to sustain the jury's finding that Mason was guilty of witness tampering.

Conclusion

We affirm Mason's conviction of second degree assault and his conviction of tampering with a witness.



WE CONCUR:

[31] RCW 9A.72.120(1).

Dwyer, A.C.J. Becker, J.